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No. 91-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH P. DI IORIO,

Petitioner,

vs.

GIBSON & CUSHMAN DREDGING CORP.,

Respondent,

GIBSON & CUSHMAN OF NEW YORK, INC.,

Defendant.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of New York Appellate Division, First Department

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Preliminary Statement

In this negligence case, petitioner Joseph P. DiIorio seeks a writ of certiorari to review the memorandum decision and order of the Supreme Court of the State of New York, Appellate Division, First Department, dated November 20, 1990, officially reported at 561 N.Y.S.2d 767.

Statement of the Case

Petitioner claims that this is a maritime case and therefore he is entitled to prejudgment interest on the verdict, to be compounded, and that a previous settlement should not have been deducted from the judgment pursuant to New York General Obligations Law ("GOL") § 15-108. The trial court rejected petitioner's claim. The New York Supreme Court, Appellate Division, First Department, affirmed the trial court decision. Even this Court refused to disturb the reduction of the award pursuant to GOL § 15-108 by denying

petitioner a stay pending the filing and disposition of a petition for writ of certiorari in 1989.

This Court should similarly reject petitioner's request for certiorari. The case presents no significant issue of law, let alone an issue of federal law. This is not a maritime case but rather an ordinary negligence case. Even if maritime law governed, the same results as those reached below would obtain. As the New York Appellate Division recognized, the issue of prejudgment interest was waived by the failure of petitioner to raise it until nearly 13 years after the action was commenced and almost two years after judgment was rendered. Since petitioner is not entitled to such interest, the issue of whether the interest is to be compounded is irrelevant. Similarly, the deduction from the judgment of the previous settlement would be warranted under either maritime law or New York law.

In an attempt to engender sympathy and to manufacture issues for this Court to review, petitioner characterizes himself as the victim of a court harboring hostility towards any maritime doctrine. The fact is, however, that the application of, or the failure to apply, maritime law did not result in petitioner's claims being rejected below. The fact that the claims were meritless under either maritime or New York law dictated the result.

Statement of Facts

Petitioner, an oiler on a barge, was injured in a 1973 explosion of a steam turbine. Thereafter, petitioner commenced the instant action, seeking recovery for his injuries from respondent Gibson & Cushman Dredging Corporation, which had contracted to perform dredging work and subcontracted the job to petitioner's employer, Atlantic Gulf & Pacific Company (4).* Petitioner commenced a separate action against his employer under the Jones Act, which he settled in 1975 for $600,000.

* Numbers in parentheses refer to pages of the Petition for Writ of Certiorari.

Following a trial before the Supreme Court, County of New York (Gammerman, J.), a jury verdict awarding petitioner $6,578,696 was rendered on December 29, 1987 (3a). In response to defendant's post-trial motion, the trial court conditionally reduced the pain and suffering component of the award from $5,000,000 to $1,500,000 and, pursuant to GOL § 15-108, deducted $600,000 from the award to account for petitioner's previous settlement with his employer, a non-party joint tortfeasor (4a). On February 8, 1988, and upon petitioner's consent to the reduction of the pain and suffering award, a judgment of the Supreme Court, New York County (Gammerman, J.), was entered in the amount of $2,478,696, reflecting the reduced award (18a).

Defendant subsequently appealed the judgment to the Appellate Division, First Department, which, after full briefing and oral argument, reversed the judgment and granted a new trial on damages unless petitioner would stipulate to reduce the future lost earnings component of the award from $1,500,000 to $750,000. The court otherwise affirmed the judgment, rejecting petitioner's cross-appeal which sought reinstatement of the full pain and suffering award and reinstatement of the $600,000 which had been deducted due to the prior settlement (22a). Among the issues raised by petitioner in his cross-appeal and rejected by the court was that maritime law applied to this case, and the trial court had erred in dismissing petitioner's claims under maritime law and in sending the case to the jury solely on the theory of common law negligence. The court's opinion expressly stated: "We have considered the other issues raised by these cross-appeals and find that they are without merit (25a)."

Petitioner thereafter moved in the New York Court of Appeals for leave to appeal from the appellate court's June 27, 1989, order, requesting another stay of the order. The Court of Appeals (Alexander, J.) declined to grant the stay and later denied the motion for leave to appeal.

Petitioner then made an unsuccessful application to this Court for a stay pending the filing and disposition of a petition for a writ of certiorari. The application was denied by the Court (Marshall, J.) on September 29, 1989 (31a).

Petitioner's counsel purported to stipulate to the New York Appellate Division's reduction on September 28, 1989 (28a). Petitioner had not mentioned prejudgment interest up to this point.

Petitioner's efforts to increase the award by his belated claim for prejudgment interest.

On September 29, 1989, petitioner served a notice of settlement of his proposed amended judgment. Although the amended judgment was supposed to reflect the appellate court's $750,000 reduction, petitioner actually sought entry of a judgment in the amount of $4,514,034, an amount more than $2,000,000 higher than the judgment petitioner purportedly consented to reduce. Petitioner had improperly inflated the proposed amended judgment by adding prejudgment interest dating from the 1973 accident. Petitioner for the first time claimed such interest was appropriate since this was purportedly a maritime case, even though every court had rejected his maritime claim and even though no New York State case had permitted such interest even in a maritime case. The trial court correctly rejected the addition of prejudgment interest, finding no basis to support such interest (38a). The court did not find it necessary to determine whether this was a maritime case or not for these purposes (43a-46a).

Defendant's counter-proposed amended judgment in the total amount of $2,030,201.18 was accordingly signed on October 5, 1989, and entered October 12, 1989.

Petitioner's subsequent attempt to increase the amended judgment.

Several days after the amended judgment was entered, by notice of motion dated October 27, 1989, petitioner moved the lower court to amend the amended judgment to add back the $600,000 the court previously subtracted from the jury award pursuant to GOL § 15-108 even though the appellate court, the New York Court of Appeals and this Court had previously refused to disturb the reduction. Petitioner also sought prejudgment interest on the $600,000. The lower court rejected petitioner's argument that the General Obligations Law was inapplicable, denying the motion (48a).

Decision at issue herein.

The petitioner again appealed to the Appellate Division, First Department, the issues raised here (61a).

That court rejected petitioner's claim, ruling as follows:

> As the quesion of prejudgment interest was not presented to the jury in this maritime personal injury action, the court is without authority to award it. (*Pires v. Frota Oceanica Brasileira, S.A.*, ___ A.D.2d ____, 554 N.Y.S.2d 855, *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55). Even without that rule, plaintiff's failure to seek prejudgment interest in connection with the original judgment, which this court modified to reduce the award for future earnings (151 A.D.2d 402), would act as a waiver of any claim with respect thereto. As to whether $600,000, the amount of the earlier settlement in a related action against a non-party joint tortfeasor, should have been deducted from the damage award, our prior determination is the law of the case. (*See, Locilento v. John A. Coleman*

Catholic High School, 134 A.D.2d 39, 43.) In any event, while plaintiff urges that maintenance and cure paid in exchange for a release cannot be deducted from a damage award, there is nothing in this record to suggest that the $600,000 was paid as maintenance and cure, which is "designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service" (*Vaughan v. Atkinson,* 369 U.S. 527, 531); the $600,000 payment was made in connection with a broad general release executed in full settlement of the related action (62a).

ARGUMENT

Certiorari should be denied since this is not a maritime case and therefore this Court lacks jurisdiction. Further, even if a federal question is presented, the decision below is proper.

This is not a maritime case.

Petitioner's claim, and the basis of this Court's jurisdiction, rests on the threshold issue of whether federal maritime law is controlling in this case. That issue has no merit.

Petitioner, relying on *Senko v. LaCrosse Dredging,* 352 U.S. 370 (1957), argues that the fact that accident occurred on board a ship requires the application of the federal maritime law (10). However, *Executive Jet Aviation Corp. v. City of Cleveland,* 409 U.S. 249 (1972), makes clear that while a maritime location is one factor in determining whether maritime law is applicable, the action must also have a maritime nexus, the existence of which turns on an examination of the case in light of traditional concepts of the role of admiralty law, the function and role of the parties, the types of vehicles and instrumentalities involved, and the causation and nature of the injury suffered.

Petitioner has failed to demonstrate that such factors warrant the application of federal maritime law in the instant case. Since petitioner cannot establish that maritime law must be applied to his case, his claims that he is entitled to prejudgment interest and a double recovery of the $600,000 he previously received from his employer must fail. Furthermore, even if maritime law applied to this case, there is no merit to petitioner's claims.

Petitioner is not entitled to pre-judgment interest.

Petitioner has entirely failed to establish that the appellate court's failure to grant prejudgment interest on his award was erroneous. Petitioner argues that the appellate court decision was based on a case that was reversed (8). However, petitioner overlooks the crux of the court's ruling, namely that petitioner's failure to raise his claim for prejudgment interest until nearly 13 years after the action was commenced or in connection with the original judgment constitutes a clear waiver of the claim under general principles of waiver and estoppel.

Before petitioner raised his claim for prejudgment interest, the case had been tried and a judgment had been entered and an appeal of the judgment heard and decided. It was only when faced with the court's reduction of the verdict, to which petitioner tried to avoid stipulating for several months, even seeking relief from this Court, that he sought to add nearly $2.8 million in prejudgment interest to the amended judgment which was being settled. Such a thirteenth-hour claim of entitlement to prejudgment interest, made to the complete surprise of both defendant and the trial court, long after the first judgment had been entered without pre-judgment interest, was merely a transparent attempt by petitioner to compensate for what he believed was the unwarranted reduction of his award by the New York State trial and appellate courts. Such a scheme should not be countenanced.

Furthermore, as the trial judge recognized in denying petitioner prejudgment interest, both his reduction of the award and the appellate court's reduction were based on the conclusions, made after careful examinations of the record, that the amount of the jury award was grossly excessive. Thus, the massive increase in the award petitioner sought by the addition of prejudgment interest would have been inappropriate and at odds with the appellate court's intention in making the reduction (43a-44a).

Petitioner is not entitled to have the amount of the prior settlement added back to the judgment.

Petitioner previously raised the issue of whether he was entitled to reinstatement of the $600,000 previously deducted from his award because of his 1975 settlement of his Jones Act claim against his employer (22a). After the appellate court rejected that claim, this Court denied petitioner a stay pending the ruling and disposition of a petition for a writ of certiorari (31a).

Petitioner's claim should again be rejected as without merit. Firstly, this is not a maritime case, so there is no basis for petitioner's claim that GOL § 15-108 cannot be applied and that *Garrett v. Moore-McCormack* governs.

In any event, petitioner's claim that the $600,000 settlement represented maintenance and cure, a claim also rejected by the New York appellate courts, is similarly without merit. Maintenance and cure are limited to the right of a seaman to food and lodging if he falls ill, plus necessary medical services. *Gardener v. Sea-Land Service, Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986). As the appellate court recognized, "there is nothing in the record to suggest" anything other than that the $600,000 petitioner received was to settle his personal injury claim (62a). Therefore, the lower courts properly refused to reinstate it in the judgment.

That being established, a procedural statute such as GOL § 15-108 would be applied even if maritime law governed. *See Wilson v. United States,* 613 F.Supp. 1322 (E.D.N.Y. 1985) (effect of release under Federal Tort Claims Act governed by GOL § 15-108). Petitioner's claim that the decision in *Swogger v. Waterman Steamship Corp.,* 151 A.D.2d 100, 546 N.Y.S.2d 80 (1st Dep't 1989), made clear that the GOL is not applicable to maritime cases is erroneous (16). *Swogger* dealt only with the issue of whether contribution and indemnification claims of vessel owners sued for the alleged wrongful asbestosis death of a marine engineer were governed by federal maritime law or GOL § 15-108. The court did not consider the issue (which it had previously ruled on in the instant case) of whether the proceeds of a settlement received from a joint tortfeasor should be deducted from the judgment.

Furthermore, the law is clear that even under maritime law a double recovery such as petitioner here claims would not be permitted. Federal maritime law, like the GOL, provides that any judgment must be reduced by the amount of prior settlements. *Self v. Great Lakes Dredge & Dock Co.,* 832 F.2d 1540 (11th Cir. 1987), *cert. denied,* 486 U.S. 1033 (1988); *Leger v. Drilling Well Control, Inc.,* 592 F.2d 1246 (5th Cir. 1979). The underlying basis for the rule mandating reduction of judgments by the amount of prior settlements under both the GOL and federal maritime law is that a plaintiff should not receive a double recovery. *See United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975); *Leger v. Drilling Well Control, Inc., supra; Bordelon v. Consolidated Georex Geophysics,* 628 F. Supp. 810 (W.D. La. 1986). Such an impermissible double recovery is exactly what would occur here if the $600,000 petitioner already received was added back to the judgment.

In this case the deduction was proper. Under GOL § 15-108, a judgment recovered by a plaintiff must be reduced either by the amount of any settlement received from a joint

tortfeasor, or by the amount of the apportioned share of the settling tortfeasor's liability, whichever is greater. In this case it is undisputed that petitioner sued his former employer, Atlantic Gulf & Pacific, under the Jones Act to recover for the same injuries involved in this action, and that he settled that suit for $600,000. That being so, and since the issue of Atlantic Gulf & Pacific's apportioned share of fault was never submitted to the jury, the lower courts properly reduced the award by the $600,000 settlement.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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